Fake news, French law and democratic legitimacy

Fake News, French Law and Democratic Legitimacy: Lessons for the United Kingdom?*

Abstract: The United Kingdom is currently examining far-reaching regulatory proposals designed to address the online transmission of various forms of harmful content, including disinformation. Of particular interest for the UK, given concerns over the transmission of false information prior to the 2016 referendum on European Union membership, is French Law no. 2018-1202 on the 'fight against the manipulation of information'. The French Law establishes a fast track civil procedure to tackle the transmission of false information in the run up to key elections and referenda; introduces measures to address foreign state funded broadcast propaganda; and seeks to enhance transparency for users on the way in which online content is financed and distributed. Restrictions on the transmission of information, particularly in the run up to elections, are inherently suspect and the Conseil constitutionnel carefully reviewed the French proposals to ensure that any restriction on freedom of expression was both justified and necessary. French Law 2018-1202 thus offers an example of a rather 'muscular' form of intervention in the election field; yet one that seeks to preserve democratic legitimacy without undermining the individual freedoms on which it rests.

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block false information are often criticised for their potential to chill legitimate expression are often criticised as overbroad and repressive of freedom of expression. The French Law thus covers some of the same ground as the Online Harms White Paper but also goes beyond it algorithms operate and address these difficulties through the introduction of a new fast track civil procedure through which a judicial order can be obtained requiring online communication providers to block further transmission of false information in the run-up to elections and referenda. The Law also contains provisions designed to address foreign state funded broadcast propaganda and introduces important transparency requirements on the providers of online platforms and introduces additional educational initiativeone of a roster of laws that have been introduced worldwide to address online disinformation, laws which have characteristically been criticised for their overbreadth and chilling effect on freedom of speech. The Law enables the transmission of foreign state controlled radio and television services that broadcast disinformation to be curtailed, or temporarily suspended, prior to key elections, and establishes a new civil procedure by which a judicial order can be obtained requiring online communication providers to block further transmission of false information in the run-up to elections and referenda. It also imposes important transparency requirements on the providers of online platforms and introduces additional educational initiatives**1. Introduction**

In December 2018 French Law no. 2018-1202 on the 'fight against the manipulation of information' ('Law 2018-1202') received approval from the Conseil constitutionnel and thus took an important step towards final implementation.[1] The Law enables the transmission of foreign state controlled radio and television services that broadcast disinformation to be curtailed, or temporarily suspended prior to key elections, and establishes a new civil procedure by which a judicial order can be obtained requiring online communication providers to block further transmission of false information in the run-up to elections and referenda. It also imposes important transparency requirements on the providers of online platforms and introduces additional educational initiatives.

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[1] *Journal officiel de la République française*, no. 0297, 23 December 2018, texte no. 2.

The Law was heavily contested throughout its passage; it was the subject of a detailed advisory opinion by the Conseil d'Etat,[2] and was rejected twice in the Senate.[3] After the adoption of an agreed text in November 2018,[4] groups of Senators and Deputies from the Senate and National Assembly referred specific articles to the Conseil constitutionnel for review, arguing that the Law constituted a disproportionate, discriminatory, and potentially chilling restriction on freedom of expression, freedom of commerce, and the right to equality, contrary to French fundamental rights and freedoms.[5] The Conseil constitutionnel has competence to assess whether proposed legislation complies with the French Constitution of 1958, together with other principles of constitutional value, including those derived from the 1789 Declaration of the Rights of Man and of the Citizen. Any hopes the parliamentarians may have had that their concerns would be accepted in this forum were, however, dashed by the Conseil consitutionnel's December 2018 Decision, which rejected the entirety of their complaints.[6] In a further decision of the same date, the Conseil also approved separate legislation applying the pre-election transparency requirements and new judicial civil procedure in Law 2018-1202 to presidential elections.[7] These decisions enable the two laws to be approved by Presidential decree and enter into force, though this can be a lengthy process.[8]

The Conseil constitutionnel's key Decision 2018-773 seems at first sight surprising because of the potential reach of Law 2018-1202 and the growing body of judicial decisions from respected domestic constitutional and international courts that have struck down a variety of 'false information' laws on free speech and press grounds.[9] Major international human rights organisations and their representatives have strongly cautioned against the adoption of such laws,[10] and Malaysia, under considerable international pressure, recently repealed a particularly draconian variant.[11] But, as

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[2] Conseil d'Etat, *Avis sur les propositions de loi relatives à la lutte contre les fausses informations* (extract), 19 April 2018, NOR : JUST1806695L; R. Letteron, 'Fake News : L'avis du Conseil d'Etat', *Liberté, Libertés cheriés* Blog, 10 May 2018 , at: http://libertescheries.blogspot.com/2018/05/fake-news-lavis-du-conseil-detat.html

[3] R. Boring, 'France: Senate Rejects 'Fake News Ban' Law', *Global Legal Monitor*, 24 September 2018 at: http://www.loc.gov/law/foreign-news/article/france-senate-rejects-fake-news-ban-bills/

[4] The agreed text, no. 190, is available at http://www.assembleenationale.fr/15/ta/tap0190.pdf.

[5] Detailed in Conseil constitutionnel, Decision n° 2018-773 DC, 20 December 2018, (hereafter 'CCD') available at: https://www.conseil-constitutionnel.fr/. For explanation of the roles played by the Conseil d'Etat and Conseil consitutionnel in the drafting and approval of legislation see E. Steiner, (2nd ed.), *French Law, A Comparative Approach*, Oxford: 2018, pp.9-14.

[6] Ibid.

[7] Decision n° 2018-774 DC, 20 December 2018. Alteration to presidential elections requires adoption of a *lois organique* and Conseil constitutionnel oversight, see Steiner, n.5, p.9.

[8] The less controversial transparency provisions may be the first to be formally approved by decree, possibly in April 2019.

[9] See eg *R v Zundel* [1992] 2 S.C.R. 731; *United States v. Alvarez*, 567 U.S. 709 (2012), and *Charles Onyango Obbo and Anor v Attorney General* (Constitutional Appeal No.2 of 2002) [2004] UGSC 1, discussed at s.5.1 below.

[10] The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda*, 3 March 2017, ('2017 Joint Declaration'), available at: https://www.law-democracy.org/live/2017-joint-declaration-by-special-rapporteurs-on-fake-news/; see also D. Funke, 'A Guide to Anti-misinformation Actions around the World', *Poynter*, 8 January 2019 at: https://www.poynter.org/fact-checking/2019/a-guide-to-anti-misinformation-actions-around-the-world/.

[11] Article 19, Malaysia: Anti-Fake News Act, 24 April 2018 at: https://www.article19.org/resources/malaysia-anti-fake-news-act/, and H. Ellis-Petersen, 'Malaysia scraps 'fake news' law used to stifle free speech', the

discussed further in this article, the Conseil costitutionnel was only prepared to uphold the Law on the basis of certain 'reservations', which establish how key provisions must be interpreted and applied, thereby containing its potential reach. Indeed, the evidential hurdles imposed by the text itself and the various reservations are such that, far from exerting a broad chilling effect on the media as some fear, the law could ultimately prove to be of limited effect.[12]

This article examines the measures adopted in Law 2018-1202 and the domestic challenges to it, with specific reference to the recent Conseil constitutionnel Decision 2018-773. It also considers the legality of the Law from the perspective of European human rights standards and its potential relevance for the United Kingdom ('UK'), which is currently exploring whether further regulation is necessary to contain the flow of fake news given the widespread distribution of misleading and false information prior to the 2016 EU referendum.[13]

2. Why was Law 2018-1202 adopted?

Michael-Ross Fiorentino, writing shortly after the National Assembly and Senate agreed a text of the law, observed that this was considered 'western Europe's first attempt to officially ban false material'.[14] But, as the Conseil d'Etat noted in its opinion on the proposal, France already has in place a range of criminal and civil measures designed to deter the publication of false information.[15] These measures are primarily contained in the foundational French Press Law of 1881, extended to online communications by Article 6 of the Law of 21 June 2004 concerning trust in the digital economy.[16] Article 27 of the 1881 Law prohibits the publication, dissemination or reproduction by whatever means of 'false news' or 'articles fabricated, falsified or falsely attributed to others', where this is done in bad faith and undermines or could undermine the public peace.[17] It also penalises the communication in bad faith of false information that could damage army morale or national war effort. The 1881 Law punishes the denial of acts of genocide and certain crimes against humanity (Article 24) and establishes liability for defamation (Articles 29-35).

Guardian, 18 August 2018, at: https://www.theguardian.com/world/2018/aug/17/malaysia-scraps-fake-news-law-used-to-stifle-free-speech.

[12] For critical commentary see R. Letteron, 'Fake News : les réserves du Conseil constitutionnel', *Liberté, Libertés cheriés* Blog, 22 December 2018, at: http://libertescheries.blogspot.com/2018/12/fake-news-les-reserves-du-conseil.html

[13] See, House of Commons, Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News': Final Report,* HC1791, 18 February 2019, and *Interim Report*, HC363, 29 July 2018; S. Adshead, G. Forsyth, S. Wood, L. Wilkinson**,** *Online Advertising in the UK*, Plum Consulting, January 2019; F. Cairncross, *The Cairncross Review. A Sustainable Future for Journalism*, 12 February 2019, at: https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism; Electoral Commission, *Digital Campaigning: Increasing transparency for Voters*, June 2018 at: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/244594/Digital-campaigning-improving-transparency-for-voters.pdf; M. Busby, I. Khan and E. Watling, 'Types of Misinformation During the UK Referendum', *First Draft*, 21 June 2017 at: https://firstdraftnews.org/misinfo-types-uk-election/; Expert Report of Professor Philip Howard, submitted in *The Queen, on the application of Susan Wilson and Others and the Prime Minister*, 30 November 2018, para.26, at: 257136-Expert-report-of-Prof-Howard-Signed-FINAL.pdf

[14] Michael-Ross Fiorentino, 'France Passes Controversial Fake News law', *Euronews*, 22 November 2018, at: https://www.euronews.com/2018/11/22/france-passes-controversial-fake-news-law

[15] Conseil d'Etat, n.2, para.6.

[16] Relevant legislative and Code provisions, including articles from the 1881 Law and Electoral Code discussed below are collated in a Dossier ('Dossier'), prepared by the Conseil's services (2018), published on the Conseil's website at: https://www.conseil-constitutionnel.fr/decision/2018/2018774DC.htm

[17] See Dossier, ibid, p.17, author's translation.

Specific rules relating to disinformation are also contained in France's Electoral Code.[18] Article L.97 of the Code creates a specific offence of employing 'false news, calumnies, or other fraudulent means' to influence voters, leading one or more to abstain from voting.[19] Those found guilty can be sentenced to a prison term of a year, or fined 15,000 euros. Article L.52-1 of the Electoral Code prohibits commercial advertising for electoral propaganda purposes in the press and 'by all means of audiovisual communication' in the six months prior to an election.[20]

Given the existence of these 'false news' provisions one might question why further legislation was deemed necessary. The answer is that social media services now offer politicians and commercial operators alike unprecedented opportunities to influence the public.[21] Providers of such services can build extremely granular information on the commercial, political and social interests of their users, enabling precise targeting of relevant political information, as well as deliberate disinformation.[22] Information can spread at speed over transient, evolving networks, built through personal links and recommendations by 'friends'. Political disinformation is not new but social media have created additional techniques and pathways for its dissemination, hidden behind private commercial arrangements and subject to limited external accountability.[23]

In France, awareness of the problems posed by false information was heightened by the 2017 presidential elections, in which Emmanuel Macron found himself the target of a number of fake news stories, including claims that he was funded by Saudi Arabia, had placed money in foreign offshore accounts, and was homosexual.[24] Some of these claims were pushed by foreign media, and Macron refused the Russian state-funded *Sputnik* news agency and RT television station access to his campaign events on the basis that they had a 'systematic desire to issue fake news and false information'.[25] The authors of false information will often not be apparent, rendering application of the existing rules problematic. French law was thus considered ill-equipped to tackle the scale and evolving nature of this problem. [26]

3. What's in a Name? False News, Fake News, False Information, Misinformation and Disinformation.

Before examining in detail the provisions of Law 2018-1202 it is worth noting a number of terminological points. The Law, in its final form, employs the expression 'false information' rather than 'false news', the term used in the 1881 Press Act and Electoral Code noted above. This stems from a recommendation made by the Conseil d'Etat, which called for a consistent approach to

[18] See Dossier, n.16, p.11.
[19] Ibid, author's translation.
[20] Ibid.
[21] See Conseil d'Etat, n.2 above, para.7
[22] Adshead et al., n.13, p.14-15, 97-98.
[23] C. Wardle, & H. Derakhshan, *Information Disorder: Towards an Interdisciplinary Framework for Research and Policy-Making*, Council of Europe Report, DGI(2017) 09, at: https://firstdraftnews.org/coe-report/; C. Ireton and J. Posetti, *Journalism, Fake News and Disinformation* (Unesco, 2018), 55-63, at: https://unesdoc.unesco.org/ark:/48223/pf0000265552/PDF/265552eng.pdf.multi,
[24] Ireton and Posetti (2018), 46-47; G. Hamann, 'Macron is Gay, Not!', *Zeit Online*, 24 February 2017, at: https://www.zeit.de/politik/2017-02/fake-news-emanuel-macron-russia-history.
[25] Reuters, 'Emmanuel Macron's campaign team bans Russian news outlets from events', the *Guardian*, 27 April 2017: https://www.theguardian.com/world/2017/apr/27/russia-emmanuel-macron-banned-news-outlets-discrimination
[26] Conseil d'Etat, n.2, para.7.

terminology throughout the new law.[27] The Conseil observed that 'false news' had been judicially interpreted to require the transmission of new, not previously published, information - in effect, new news. Given the rapid nature of modern electronic communications, a similar interpretation could result in a considerable amount of false information falling outside the scope of the new Law. The Conseil d'Etat thus suggested use of the broader term 'false information' rather than 'false news'.

This approach is in line with the preference among academics and policy makers to avoid the previously fashionable term 'fake news'.[28] The term was introduced to focus attention on the specific problem of political disinformation in social media networks, particularly during the 2016 US presidential elections, and was defined by Allcott and Gentzkow as 'news articles that are intentionally and verifiably false, and could mislead readers'.[29] From this perspective 'fake news' is, in a fundamental sense, not 'news' at all. Those creating it do not intend to provide information about current events or to follow the basic ethical standards, notably accuracy, expected of journalists. Their intention is to convey false information, and, as illustrated by the case of the Macedonian bloggers who produced false information prior to the US presidential elections, those fabricating fake news may care very little about its impact on voters, their motivation will often be to earn money from related advertising.[30]

The term 'fake news' has, however, been applied not only to genuinely problematic content, such as intentionally fabricated, manipulated or 'imposter' content, which could cause harm to individuals or society more generally,[31] but also to content that is perfectly legitimate, even highly desirable, such as political satire, parodies, opinions, or information with which the user of the term simply disagrees[32]. Use of the term could thus encourage overbroad regulation or a failure to identify, with sufficient clarity, the nature of problematic content. The Special Rapporteurs on freedom of expression in their 2017 Joint Declaration concluded that general prohibitions based on 'vague ideas' such as 'false news' would be incompatible with international standards;[33] while the EU High Level Group on Fake News suggested the terms 'misinformation' and 'disinformation' be used rather than 'fake news'[34].

Following the Conseil d'Etat's advice, Law 2018-1202 now employs the broad term 'false information' fairly consistently. However, in the new Article L.163-2.-1. of the French Electoral Code, added by Law 2018-1202, there is, exceptionally, a reference to 'inexact or misleading allegations or imputations of fact'. This is potentially more open-ended than 'false information': how inexact or misleading does

[27] Conseil d'Etat, n.2, para.10.
[28] See DCMS, n.13, paras.11-15; Wardle and Derakhshan, n.23, p.5; Ireton and Posetti, n.23, pp.44-55.
[29] H. Allcott and M. Gentzkow, 'Social Media and Fake News in the 2016 Election', April 2017 (revised), *National Bureau of Economic Research Working Paper* 23089, available at: https://www.nber.org/papers/w23089.pdf and note also Wardle and Derakhshan, n.23, p.11, available at: https://firstdraftnews.org/coe-report/
[30] E. J. Kirby, 'The City Getting Rich From Fake News', *BBC News*, 5 December 2016: https://www.bbc.co.uk/news/magazine-38168281
[31] For instance, in the context of health or environmental information, see L. Spinney, 'Fighting Ebola is Hard. In Congo, Fake News Makes it Harder', *Science*, 14 January 2019, available at: https://www.sciencemag.org/news/2019/01/fighting-ebola-hard-congo-fake-news-makes-it-harder.
[32] S. Coll, 'Donald Trump's "Fake News" Tactics', *The New Yorker*, December 11 2017. For a typology of fake news see Wardle and Derakhshan (2017), n.23.
[33] 2017 Joint Declaration, n.8, 2.a.
[34] European Commission, *A Multi-Dimensional Approach to Disinformation, Report of the Independent High Level Group on Fake News and Online Disinformation*, March 2018, pp.10-11.

the allegation have to be, how apparent the imputation?[35] The different expressions used in Law 2018-1202 have the potential, therefore, to create continuing uncertainty.

Unlike the term 'disinformation', which the EU High Level Group on Fake News define as 'false, inaccurate or misleading information being designed, presented and promoted to intentionally cause public harm or for profit',[36] 'false information' addresses merely the substantive quality of the information, its falsity. This tells us nothing about whether the author, publisher or distributor knows of its falsity or has any ulterior motive to cause harm or profit from its distribution. It was thus necessary for the French Law to make separate provision for any required mental element, taking into account the subject of the various provisions and context.

From a recipient's perspective, unintentional misinformation can be as problematic as deliberate disinformation, and both can undermine individual autonomy and informed political choices. This is the reason why many state and industry rules, for instance in the consumer protection field, seek to deter material misinformation generally, whatever the motivation of the communicator.[37] In the context of political speech, however, strict liability can have a chilling effect and the French 'false news' offences in the 1881 Press Law and Electoral Code both require an element of bad faith.[38]

In relation to the new Law, the Conseil d'Etat held that, to avoid disproportionate restrictions on freedom of expression and to comply with the requirements of the ECHR, controls based on false information should be systematically limited to cases where there was a deliberate intention to cause harm.[39] As discussed further below, in order to restrict the transmission of false information prior to elections, the Law does require there to be an intention to transmit the false information.[40] Such information must also be of a type that could affect the reliability of the ballot, though it does not appear necessary for the distributor to intend to have this effect, they could, for instance, be interested in commercial gain, it is sufficient that the transmission could have this effect.

4. How does Law 2018-1202 Seek to Prevent the Manipulation of Information?

The French legislature recognised that there is no one silver bullet that can be employed to prevent the publication and spread of false information, online or off. A more holistic approach was thus adopted, with four main overlapping strands designed to curb foreign state disinformation; prevent further online transmission of false information prior to elections; ensure greater transparency in the operation of online communication platforms; and stimulate new educational initiatives. These are examined in more detail below.

4.1 Curbing foreign state disinformation

Article 5 of Law 2018-1202 revises Article 33-1 of Law 86-1067 on Freedom of Communication (the '1986 Law').[41] This enables the French media regulator, the CSA, to refuse to enter into an agreement, or 'convention', to allow certain radio and television services to be broadcast in France where the CSA considers that they could pose a 'grave risk' to certain important interests. These include the need to

[35] Letteron, n.12.
[36] European Commission, n.34, p.10.
[37] Consider the UK Consumer Protection From Unfair Trading Regulations 2008, S.I. 2008 No.1277, regulations 9-12, establishing strict liability offences.
[38] See text accompanying nn.16-20.
[39] Conseil d'Etat, n.2, para.10.
[40] See sections 4.1-2, below.
[41] For details, see Dossier, n.16.

prevent attacks on the dignity, liberty and property of others; maintenance of a diverse flow of thoughts and opinions in society; the protection of children; the safeguarding of public order; and the protection of the fundamental interests of the nation, including the proper functioning of the nation's institutions. The transmission of false information could potentially threaten a number of these interests. Refusal of a convention is also possible where this would lead to a breach of existing law and, as noted above, a number of French laws explicitly tackle the publication of false news.

This provision relates to radio and television services that do not use frequencies assigned by the CSA and are broadcast simultaneously to the public according to a set programme.[42] It is not, therefore, restricted to foreign state controlled or influenced companies. But when a convention is sought by such a company, the CSA can, exceptionally, take into account not only the programmes provided by the applicant company on its own services but also content edited by related subsidiary and parent companies on other communication services relayed by electronic means.

By virtue of Article 8 of the new Law, the CSA can also resile from an agreement entered into with a company controlled by or under the influence of a foreign state, where the service provided threatens the fundamental interests of France, including the proper functioning of its institutions.[43] The Law here expressly states that this can arise from the transmission of false information. As with a refusal to enter into a convention, the CSA can take into account content edited by related companies and relayed over other electronic communication services, though here it is expressly stated that the CSA cannot base its decision solely on this content.

Finally, Article 6 of the new Law introduces new Article 33-1-1 into the 1986 Law. This allows the CSA to order the suspension of the distribution by any electronic means of a television or radio service owned or controlled by a foreign state, with which the CSA has entered into a convention, from three months prior to the first day of the month in which a presidential, general, or European Parliament election, or referendum, is to be held. The CSA can only make the order where the company intentionally transmits false information of a type that could bring into question the reliability of the ultimate vote. It is required to notify the service provider of its concerns and the company has forty-eight hours to make its case for continued transmission. The CSA must give reasons for its decision and notify these to the company concerned and those satellite or other distributors that are required to suspend their transmission of the service. The CSA's decision can be referred to an administrative judge for review.

4.2 Preventing the Online Transmission of False Information During Elections and Referenda

The new powers of the CSA in Article 6 provide a mechanism to prevent the transmission of false information prior to key elections and referenda but relate solely to broadcast services under foreign state influence. Article 1 of Law 2018-1202 extends the scope of protection further by introducing a new Article L. 163-2.–I into the French Electoral Code. This comes into play where 'inexact or deceptive allegations or imputations of fact' are transmitted over a publicly accessible online communication service in the three months preceding the first day of the month of a general election.[44] Faced with such problematic content, a minister, candidate, political party or group, or interested individual, can apply to a judge for an order requiring that providers of online

[42] Art.2, Law 86-1067, ibid.
[43] Provisions now contained in Art.42-6 of Law 86-1067, Dossier, n.16.
[44] Author's translation. It does not apply to municipal elections.

communication services,[45] or, as a backstop, internet service providers, take the necessary steps to prevent the continuing diffusion of the false information.

To obtain the order under Article L. 163-2.–I, it must be established that the inexact or deceptive information was transmitted intentionally, using artificial or automated systems, on a mass scale. The information must also be of a type that, if distributed, could bring into question the reliability of the future ballot. Any steps ordered by the judge to prevent further transmission must be both necessary and proportionate.

These civil proceedings are designed to provide a rapid means of addressing the spread of online disinformation in that the judge has just forty-eight hours from receipt of the application to reach a decision. An appeal is possible but the appeal court is similarly required to reach its decision within forty-eight hours.

4.3 Transparency Requirements and Co-operation by Online Platform Providers

Article 1 of Law 2018-1202 also amends the Electoral Code by adding a new Article L.163-1, which requires those operating online platforms with over a certain number of users in France to keep their users informed about certain matters during the three months prior to a general election up until the end of balloting.[46] The information, which must be clear and accurate, is to include details of individuals and companies, as well as those on whose behalf they are acting, who have paid for information relating to 'a debate on a matter of public interest' to be promoted on the platform. The Conseil d'Etat noted that the ECtHR employs this expression in relation to subject matter that affects the public to such an extent, 'notably because it concerns their well-being or the life of the community, that it is of genuine public interest'.[47] In addition, details regarding the use made of personal information in the promotion of such content and the amount paid for such promotion, where this exceeds a certain threshold, must also be published.

The new Law thus seeks to inform the public about the source of paid-for online content relevant to a forthcoming election and the basis on which individuals are being targeted. The information is to be aggregated in an online, public, open format, register, which must be regularly updated during the election period. The penalties for failure to provide such information are significant: a one year prison sentence or a 75,000 euro fine.

These measures are complemented by further provisions in Title III of the Act, designed to encourage online platform providers to become more engaged generally in the fight against false information both individually and through co-ordinated self-regulatory initiatives. In particular, they are required by virtue of Article 11 to provide a facility through which users can flag-up false information that could undermine public order or bring into question the reliability of an election. The Act thus goes beyond the provisions in the recently revised EU Audiovisual Media Services Directive, which requires Member

[45] Within the terms of paragraph I-2. of Article 6 of Law n° 2004-575 of the 21 June 2004, see Dossier, n.16. This broadly covers those online communication services that host third party content, as opposed to providing their own content. The fact that the company classifies or organises the third party content and provides advertising around it does not prevent it from falling within the scope of this provision.

[46] Article L.111-7 of the French Code de la consummation, see Dossier, n.16, defines those covered as those operating online platforms who provide, on a professional basis, communication services to the public involving the classification or referencing by means of algorithms of content, goods or services provided by third parties or linking individuals in order to facilitate the sale of a good or service or the exchange or sharing of content, a good or a service (author's translation).

[47] Conseil d'Etat, n.2, para.16, referring to the ECtHR judgement in Application no. 40454/07, *Couderc et Hachette Filipacchi Associés v France*, 10 November 2015, para.103.

States to ensure that video-sharing platform providers under their jurisdiction take steps to protect minors, and prevent the dissemination of hate speech and criminal, including terrorist, content, but does not, in this context, address false information.[48]

Online platform providers are also expected to take action to enhance transparency and media literacy, enabling users to better evaluate the quality of available content and understand the basis on which it has been selected, for instance through algorithms. The list of actions additionally includes the promotion of content from generally reliable sources, such as press agencies; and steps to prevent the mass transmission of false information. The platform operators are to publish details of the measures taken and report annually on progress in these areas to the CSA.

Article 14 requires certain statistical information to be published regarding the use of algorithms to recommend, rank or reference information on matters of public interest. This is to include the extent to which users are able, and do, select such information independently and the proportion who receive such content because of an algorithm operating on the platform.

The Conseil d'Etat considered whether the transparency requirements could potentially infringe the free movement of services protected under EU law and, more particularly, the terms of the Electronic-Commerce Directive.[49] Article 3.2 of the Electronic-Commerce Directive precludes States from restricting the transmission of information society services from other Member States on grounds falling within the fields co-ordinated in the Directive. The Directive, however, only establishes limited transparency requirements concerning the identity and location of the provider of the information society service and the Conseil d'Etat appeared to question whether the provisions in the French Law, which do not have an economic motivation, could be seen to pursue a similar objective.[50] Article 3.4 of the Directive does, however, allow states to derogate from Article 3.2 on grounds of public policy, public health, national security, and the protection of consumers, all of which might be brought into play to justify controls of fake news. Such measures must be necessary and proportionate. If the provisions of the French Law fall outside the scope of the Directive they will still impose additional burdens on information society services, including those operating from other EU countries, and thus have the potential to restrict the free movement of services. The Conseil d'Etat concluded, however, that such restrictions could be justified as protecting legitimate general interests recognised in EU law, including consumer protection and the need to preserve a certain quality of television programming.[51]

4.5 Educational Initiatives

Title IV of Law 2018-1202 modifies the French Code on Education to include further consideration of the internet and online communications in civic and technical education in schools, in particular to foster a critical and questioning attitude as to the reliability of online information. There is also provision for additional coverage in the context of higher education.

5. Review by the Conseil constitutionnel and the Human Right's Dimension

Given the potential implications of these measures for political speech and commercial freedom, it is not surprising that groups of Senators and Deputies referred specific articles of the agreed text,

[48] Directive (EU) 2018/1808, 14 November 2018, *OJ* L 303/69–92 (28/11/2018), Art.28b.
[49] Directive 2000/31/EC, 8 June 2000, *OJ* L178/1-16 (17/7/2000). Further examination of the conformity of the French law with EU law, though important, lies outwith the scope of this article.
[50] Conseil d'Etat, n.2, para.12.
[51] Ibid.

including those discussed in the section above, to the Conseil constitutionnel.[52] The constitutional guarantees that were held to have been infringed include the freedom of expression and communication, freedom of commerce, the rights of voters and integrity of the electoral process, equal treatment, as well as certain rights relating to the clarity and non-retroactivity of penal proceedings and fair administrative procedures. The concerns were thus substantive and procedural in nature.

This section explores the Conseil constitutionnel's response to the various references, focusing for reasons of space, on the substantive concerns. I also consider the law from an ECHR perspective and whether the ECtHR would consider the various measures to be legitimate restrictions on the freedom 'to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers' under article 10(1)ECHR. The section starts, however, with a preliminary question – whether the deliberate transmission of false information is protected at all by guarantees of freedom of expression under the French or ECHR human rights regimes.

5.1 Is Disinformation Protected Speech?

An initial observation is that the Conseil constitutionnel accepted that false information, even when intentionally published, falls within the protection afforded freedom of expression by Article 11 of the 1789 Declaration of the Rights of Man and Citizens.[53] Article 11 provides that the 'free communication of thoughts and opinions is one of the most precious rights of man: every citizen can thus speak, write, and print freely, except in cases determined by the law in order to respond to abuses of this freedom'.[54] The Conseil did not, therefore, address this preliminary issue, focusing instead on whether the various articles in Law 2018-1202 that could restrict freedom of expression were deigned to address abuses of the right and were clear, legitimate and proportionate.[55]

The argument that the transmission of false information is not covered by free speech guarantees has been raised and rejected in a number of influential Supreme Court cases.[56] From a European perspective, the European Court of Human Rights (ECHR) allows only very limited exceptions to the scope of Article 10(1) ECHR, protecting even speech that shocks or disturbs.[57] Rather than carve out categorical exceptions, the ECtHR prefers instead to evaluate whether state restrictions curtailing false information are legitimate and proportionate constraints on freedom of expression under Article 10(2).[58] The approach of the Conseil would thus appear to be in line with key European and other high-level domestic courts. In the UK context, however, the English High Court in the judicial review case of *Woolas,* held that the dishonest publication of false information prior to elections would not be protected by freedom of expression. [59] It is thus worth exploring whether there are certain contexts where the transmission of false information will not be protected by Article 10(1)ECHR

[52] CCD, n.5.
[53] CCD, n.5, para.14.
[54] Author's translation.
[55] See section 5.2 below.
[56] See cases cited at n.9.
[57] Application no.6538/74, *Sunday Times (no.1) v UK*, 26 April 1979, para.65.
[58] See Application no.10572/83, *Markt Intern Verlag GMBH and Klaus Beermann v Germany*, 20 November 1989, para.26.
[59] *Woolas, R (on the application of) v The Speaker of the House of Commons* [2010] EWHC 3169 (Admin) (03 December 2010), para. 106.

Three rationales are usually given for protecting freedom of expression.[60] Firstly, freedom of expression is considered essential for the proper functioning of the democratic process, enabling informed discussion of public policies and government action without fear of sanction.[61] Secondly, it facilitates personal development and autonomy, allowing individuals to explore how best to lead their lives and express their individuality.[62] Thirdly, it enables scientific theories and other factual claims to be critically tested, leading to the advancement of knowledge and human wellbeing.[63]

If these are the core objectives underpinning free speech protection, it is not immediately apparent how the deliberate publication of false information assists in their realisation. Particularly in time-sensitive contexts, such as elections, false statements may go unchallenged or demand valuable time to rebut. In relation to autonomy, Thomas Scanlon has noted how deliberate manipulation of beliefs or emotions impedes critical judgement and may lead to unreliable decisions.[64] More fundamentally, disinformation denies individuals the freedom to choose for themselves.[65] In relation to scientific development and human understanding, the challenge of rebutting false claims may, as Mill argues, push those supporting a particular theory to clarify and articulate their position more clearly, but responding to such challenges takes time and the process of engagement with the false idea may itself cause confusion.[66]

In the influential Canadian Supreme Court case of *R v Zundel*, however, the Court rejected the general proposition that false statements do not benefit from the protection of freedom of expression, a right recognised in section 2.b of the Canadian Charter of Fundamental Rights and Freedoms.[67] At issue was a broad prohibition on the publication of a false 'statement, tale or news', in circumstances where the publisher knows that the publication is false and it causes, or is likely to cause, 'injury or mischief to a public interest' (s.181 of the Criminal Code). The Court held that '*all communications which convey or attempt to convey meaning* are protected [by s 2.b] unless the physical form by which the communication is made (for example, by a violent act) excludes protection'.[68]

McLachlin J., speaking for the majority, gave two main reasons for refusing to deny protection to the expression of false information. Firstly, even a deliberate lie has potential value, helping in some situations to 'foster political participation or self-fulfilment'.[69] Protection should consequently not be excluded in principle, rather the potential value or harm caused by a particular statement considered in its context. The second reason was that it is often difficult to establish whether a statement is true or false, particularly since statements can be open to very different interpretations. The Court thus concluded that 'falsity' on its own was an inappropriate criterion for denying constitutional protection.[70]

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[60] For a classic exposition, see E. Barendt, *Freedom of Speech* (Oxford University Press, 2007), chapter one, who adds a further rationale, the suspicion of government and risk of governmental repression.
[61] A. Meiklejohn, 'Free Speech and its Relation to Self-Government' in Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper and Row, New York. 1960).
[62] Explored by J. Charney, *The Illusion of the Free Press* (Bloomsbury, 2018), ch.4.
[63] J.S. Mill, *On Liberty* (Penguin Books, 1882), chap.2.
[64] T.M. Scanlon, 'Freedom of Expression and Categories of Expression' 40 University of Pittsburgh Law Review 519 (1979), pp.524-7, see also Charney, n.62.
[65] Ibid.
[66] Mill, n.63, pp.96 and 116.
[67] *R v Zundel*, n.9, the dissenting judges did so on the basis that the restriction on speech was proportionate, not that false speech does not attract protection. For influence, see *Charles Onyango Obbo*, n.9, above.
[68] Ibid, para.23.
[69] *R v Zundel*, n.9, paras.28-29.
[70] *R v Zundel*, n.9, paras.30-33.

In the USA, specific categories of speech have been held to fall outside First Amendment protection, including 'fighting words', obscenity, child pornography, and fraud, which may, of course, involve deliberate misinformation.[71] The US Supreme Court has, however, similarly refused to recognise a broad and general exception for false information, ruling, in *US v Alvarez,* that '[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements'.[72]

The ECtHR affords Article 10(1) ECHR expansive scope and, as noted, is reluctant to exclude categories of speech from protection altogether. One such exception concerns the application of the 'abuse of law' doctrine under Article 17ECHR, designed to prevent reliance on Convention rights to undermine the enjoyment by others of their rights.[73] In *Chauvy and others v France,* the ECtHR held that there was a 'category of clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17'.[74] Even here, however, the doctrine has been carefully contained and in *Perinçek v Switzerland*, which concerned a statement denying the genocide of the Armenian people in Turkey in 1915, the Grand Chamber emphasised that Article 17ECHR should only be employed in 'exceptional' circumstances.[75] In the context of Article 10, it must be 'immediately clear' that the expression in question is being used for ends 'clearly contrary to the values underpinning the Convention'.[76] The Court also noted that it was not the role of the ECtHR to arbitrate on an underlying historical matter forming part of an ongoing public debate.[77]

Could, however, the deliberate transmission of false information immediately prior to an election capable of influencing voter choices - the situation addressed in the French legislation - meet the restrictive criteria established in *Perinçek*? Article 3 of the First Protocol to the ECHR requires state parties to 'hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. The unchecked transmission of disinformation undermines the ability of the people to form opinions and act on them at the ballot box. Moreover, unlike disputed historical events, there will be cases where it is possible to establish, using reputable empirical evidence, that a particular statement is false. Pope Francis, for example, rebutted the claim, made during the 2016 US presidential elections in a satirical website that he supported Donald Trump, by confirming that he did not endorse any particular candidate.[78] History does indeed warn that prejudice and self-interest can lead to the rejection of true claims, but modern democratic societies cannot function on an all-embracing scepticism.[79] Indeed, key state institutions, such as the law, operate on the basis that it is possible to empirically establish the truth or falsity of certain statements, applying various standards of proof.[80] In practice, of course, falsity will often be difficult to prove, or to prove within a newsworthy timeframe,

[71] For discussion see *US v Alvarez*, n.9, Justice Kennedy, at II. In *Va. Pharmacy Bd. v. Va. Consumer Council* 425 U.S. 748 (1976) the Supreme Court held that '[u]ntruthful speech, commercial or otherwise, has never been protected for its own sa[k]e' (p.425).
[72] *US v Alvarez*, n.9, Justice Kennedy, at II.
[73] For critical evaluation see H. Cannie and D. Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' 29 *Netherlands Human Rights Quarterly* 54 (2011).
[74] Application no.64915/01, *Chauvy and Others v France*, 29 June 2004, para. 69.
[75] Application no.27510/08, *Perinçek v. Switzerland,* 15 October 2015, para.114.
[76] Ibid.
[77] *Perinçek*, n.75, para.223.
[78] See discussion of this claim by Sydney Schaedel, 'Did the Pope Endorse Trump?' at FactCheck.org, 24 October 2016: https://www.factcheck.org/2016/10/did-the-pope-endorse-trump/.
[79] Charney, n.62, ch.1.
[80] Consider the law of defamation in the UK, where 'truth' is a defence.

particularly where this involves establishing a particular event did *not* occur, for example, that the Clintons were *not* involved in a paedophile ring based in a US pizza restaurant.

It is arguable, therefore, that the kind of pre-election content targeted by the French Law could be excluded from the protection of Article 10(1)ECHR. The English High Court in *Woolas*, noted above, concluded, when applying section 106 of the Representation of the People Act 1983, that the protection of Article 10(1)ECHR would be forfeit in the context of the deliberate, though not negligent, publication of false statements relating to an election candidate.[81] Drawing on Article 17 and Article 3 of the First Protocol ECHR, the Court concluded that '[t]he right of freedom of expression does not extend to the publishing, before or during an election for the purpose of affecting the return of any candidate at an election, of a statement that is made dishonestly, that is to say when the publisher knows that statement to be false or does not believe it to be true. … The right to freedom of expression under Article 10 does not extend to a right to be dishonest and tell lies'.[82]

As Cannie and Voorhoof argue, however, in relation to the ECtHR, the application of the abuse doctrine significantly curtails the ability of the Court to provide an independent check on state constraints on freedom of expression, notably through its evaluation of the proportionality of such measures.[83] Given the ECtHR's sensitivity over restraints on political speech and clear desire to keep Article 17ECHR in check, it seems likely that the Court, if asked to consider such a matter, would regard state prohibitions on the deliberate expression of false information prior to elections to be restrictions on freedom of expression, rather than deny protection altogether under the abuse of law doctrine. Indeed, the ECtHR has applied Article 10(1)ECHR in various false information contexts, such as defamation, and in *Salov v Ukraine*, the Court did not question the parties' agreement that Ukrainian measures, which penalised various forms of bribery and deceit designed to influence election results, were restrictions on expression protected by Article 10(1) ECHR.[84]

5.2 Legitimate Aim, Clarity, Necessity and Proportionality

As discussed above, the Conseil constitutionnel's decision was based on the premise that the transmission of disinformation is covered by the constitutional protection afforded freedom of expression. The Conseil noted that under Article 34 of the French Constitution it is for the legislator to establish the rules governing the exercise of civic rights and fundamental freedoms and thus to reconcile the freedom of communication recognised in Article 11 of the 1789 Declaration with other values of constitutional importance.[85] Any measures taken by the legislator to address legitimate competing concerns must be sufficiently clear, necessary, effective and proportionate.[86]

This approach is similar to that adopted by the ECHR when applying Article 10(2), by virtue of which state restrictions on freedom of expression must be prescribed by law, pursue a legitimate objective,

[81] *Woolas*, n.59.
[82] Ibid, para.106.
[83] Cannie and Voorhoof, n.73.
[84] Application no.65518/01, *Salov v Ukraine,* 6 September 2005, para.100, though note that Salov, unsure of the truth of the allegations, did not intend to circulate disinformation.
[85] CCD, n.5, paras.14 and 17.
[86] CCD, n.5, para.15.

be necessary in a democratic society and proportionate.[87] States are allowed a margin of appreciation but in key areas, for instance in the field of political speech, this latitude is heavily restricted.[88]

i) Legitimate Aim

Article 11 of the 1789 Declaration itself confirms that freedom of speech can be limited in order to address cases of abuse.[89] Such restrictions, as noted, must be established by law. To prevent such abuse, the Conseil observed that freedom of expression could be restricted in order to protect public order, the rights of others, and the preservation of the pluralist nature of socio-cultural communications.[90] Merely preventing the transmission of false information is not a sufficient objective, some additional identified harm to individuals or society must be in issue. These grounds broadly cover the various bases on which the CSA can refuse to grant a convention under Article 5.

The Conseil also relied heavily on Article 3 of the Constitution, which recognises the central democratic importance of universal suffrage and a secret ballot.[91] Protecting the credibility of elections is thus a constitutional principle that has to be reconciled with the freedom of expression.[92] The Conseil noted that those articles of Law 2018-1202 that seek to prevent the spread of false information, either by foreign states (Art.5) or more generally (Art.1), prior to key elections and referenda were restricted, expressly or by implication, to cases where the transmission of the false information could have an influence on electors.[93] Similarly, the pre-election transparency requirements in Article 1, which constrain the freedom to carry on a business, could be justified by the general interest in facilitating informed and open electoral debates, an objective explicitly identified in the text of the Law itself.[94] Under Article 8, the CSA can resile from a convention where the disinformation broadcast by a foreign state-controlled company threatens the regular functioning of state institutions, and this, too, could be understood to include the operation of the democratic process and elections.

The various fundamental interests and objectives that justify restrictions on freedom of expression and commerce identified by the Conseil constitutionnel are broadly in line with those recognised by the ECtHR in the context of Article 10ECHR. These are primarily derived from Article 10(2)ECHR, though opposing rights may also be called directly in aid, and include national security, territorial integrity and public safety, prevention of disorder or crime, and the protection of the reputation or rights of others. In *Salov v Ukraine*, the ECtHR confirmed that providing voters with true information in the course of an election campaign was a legitimate ground for restricting speech.[95] The ECtHR has also accepted, in a series of licensing cases focusing on the third sentence of Article 10(1)ECHR, that the preservation of media pluralism is a legitimate basis for state restrictions in the broadcast field, with key principles set out in the foundational case of *Informationsverein Lentia v Austria.* [96]

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[87] Application no.17419/90, *Wingrove v UK*, 25 November 1996, para.36.
[88] *Wingrove*, n.87, para.58; *Salov*, n.84, para.104.
[89] See details at n.54.
[90] CCD, n.5, paras.14 and 32.
[91] CCD, n.5, para.16
[92] CCD, n.5, paras.16-18.
[93] CCD, n.5, paras.18 and 51.
[94] CCD, n.5, para.9.
[95] *Salov*, n.84, para.110; see also application no. 24839/94, *Bowman v UK*, 19 February 1998, para.36, which emphasised the importance of fair and open elections.
[96] Application nos. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, *Informationsverein Lentia v Austria,* 24 November 1993, para.38.

ii) Lack of Precision

A recurrent concern raised by the Senators and Deputies was that key terms employed in the Law were insufficiently precise to guide action. These included the term 'false information', employed in Articles 1, 6, 8, 11 and 12, and the phrase 'inexact or misleading allegations or imputations of fact', in Article 1. In relation to Article 8, it was argued that the open-ended nature of 'false information' would enable the CSA to resile from a convention on the basis of simple errors, exaggerations or information that could not be verified because of the need to protect journalists' sources.[97] In relation to Article 1 and the procedure for a new judicial order, it was argued that parodies, simple mistakes or errors could be targeted.[98] Read in isolation, these phrases are undoubtedly open to a range of different interpretations, particularly the reference to 'inexact or misleading allegations or imputations of fact'.[99]

The Conseil constitutionnel responded to these concerns in an important paragraph 21. Though focusing on the judicial order in Article 1, the interpretative principles which it established have been applied more generally, for instance, in relation to Article 11, which requires operators of online platforms to take action against accounts propagating 'false information' on a mass scale.[100] The Conseil emphasised the importance of freedom of expression in guiding the interpretation of the Law, particularly in the political domain.[101] A judicial order under Article 1 could only be made, therefore, in relation to allegations or implications of inexact or misleading *facts* - opinions, parodies, partially inexact statements or simple exaggerations were not covered. It was for those seeking the order to objectively establish the manifest falsity of the allegations.[102] It was also necessary to establish that the false information was manifestly capable of affecting the reliability of the forthcoming election or referendum.[103]

Certain of these constraints are articulated in the law itself but the Conseil added the requirements of objective evidence and manifest proof in relation both to the falsity of the expression and its potential impact. The term 'manifest' imposes an extremely high standard of proof, allowing little or no room for doubt. As noted above, this standard will be easier to meet where a claim is limited in scope and rebuttal evidence is relatively accessible, as in the Pope Francis presidential endorsement report, as opposed to the more complex, and possibly more damaging, type of fantasy claim, exemplified by the report concerning the Clintons and a paedophile ring.[104] Determining the potential impact of specific false statements on voting decisions will be particularly difficult to establish. Building convincing, rather than anecdotal, conclusions takes time, requiring access to social media data and/or survey information.[105] As a result, any empirical evidence put forward is likely to be strongly contested on methodological grounds. A recent attempt to argue, as part of a broader case, that pro-Brexit

[97] CCD, n.5, para.45.
[98] CCD, n.5, para.11.
[99] See text at n.35.
[100] CCD, n.5, paras.86-87.
[101] CCD, n.5, paras.15 and 22.
[102] CCD, n.5, para.23.
[103] Ibid.
[104] See text accompanying n.78.
[105] Consider Allcott and Gentzkow, n.29, and A. Guess, B. Nyhan, J. Reifler, *Selective Exposure to Misinformation: Evidence from the Consumption of Fake News during the 2016 U.S. Presidential Campaign*, 19 January 2018, p.12, at: https://www.dartmouth.edu/~nyhan/fake-news-2016.pdf.

information, some of it false, circulated widely on social media before the UK 2016 European Referendum, could have influenced voting positions, was held to be 'full of speculation'.[106]

The requirements are cumulative, so that even though it may be relatively easy to establish the falsity of, for example, the Pope Francis endorsement, those seeking to prevent further distribution will have to show that its distribution could have an impact on voter decisions. Given that the judge has just forty-eight hours to make such a ruling,[107] only the most blatantly false statements, backed with convincing empirical evidence as to impact, are likely ever to be the subject of an order.

Other phrases were also argued to be vague, but in all cases the Conseil considered them to be sufficiently precise, either as they stood, or as interpreted in light of their context and/or the need to protect freedom of expression. Thus, the Conseil held that the phrases 'safeguarding of public order' and 'fundamental interest of the nation' in article 5 had been repeatedly used by the legislator and previously judicially applied, and were not, therefore, unduly imprecise.[108] In relation to a 'debate on a matter of public interest', in the pre-election transparency requirements in article 1, the Conseil held that this had to be understood as limited to information relevant to the electoral campaign.[109] Although this interpretative reservation brings the obligation within more manageable bounds, the field remains a broad one and one that may change over time. Clarity is here particularly important, given the significant penalties that can be imposed for failure to provide the information required.[110]

Restrictions on freedom of expression under Article 10(2) ECHR must similarly be 'prescribed by law', that is, provide a clear indication to individuals and companies, if need be on the basis of appropriate advice, as to when their actions may be subject to legal constraint.[111] The 2017 Joint Declaration by the Special Rapporteurs considered terms such as 'false news' or 'non-objective information' to be unacceptably vague, but, as noted above, the concept of 'false information in the French law has been considerably contained.[112] In the case of *Salov v Ukraine*, the ECtHR accepted that Article 127 of the Ukrainian Penal Code, which prohibits interference with a citizen's electoral rights through, among other things bribery or deceit, was sufficiently clear to cover the dissemination of false news about a presidential candidate prior to an election.[113] The provisions in the French law, as interpreted, appear rather more specific than the Ukrainian provisions, which suggests that the ECtHR would find them to be sufficiently precise. It is likely, therefore, that the question of their legitimacy would instead turn on the Court's approach to their proportionality, considered below.

iii) Necessity and proportionality

At the heart of the references were a number of complaints that specific articles were either unnecessary or disproportionate. In relation to necessity, the Senators and Deputies questioned the need for the new judicial procedure in Article 1.[114] The point was not directly addressed by the Conseil

[106] S. Harrison, 'High Court judge describes challenge by British expatriates to halt Brexit as "hopeless"', *The Irish News*, 11 December, 2018, and Expert Report of Professor Philip Howard, n.13.
[107] The Conseil d'Etat questioned whether this procedure would be swift enough to address the spread of the disinformation, n.2, para.18, while the Deputies suggested such speed could rather bring into question the fairness of the procedure and undermine rights: CCD, n.5, para.13.
[108] CCD, n.5, para.34.
[109] CCD, n.5, para.8.
[110] Penal law must be sufficiently precise to prevent its arbitrary operation: CCD, n.5, para.4.
[111] Application no.10572/83, *Markt Intern Verlag GmbH and Klaus Beermann v Germany,* 20 November 1989, paras.29-30.
[112] 2017 Joint Declaration, n.8, para.2a.
[113] *Salov*, n.84, paras.108-109.
[114] CCD, n.5, para.11.

which rather emphasised that it was for the legislature to decide how best to reconcile the various rights and values in play. As discussed in section 2 above, the new fast-track, pre-emptive civil action does add substantively to the existing penal and civil provisions by allowing proceedings to be commenced where the author of the publication is not known.

On proportionality, two arguments were particularly prominent; namely, that the categories of restricted content were unduly broad and that the pre-election suspension orders were unduly lengthy.[115] In relation to the former question, we have already noted that the Conseil constitutionnel imposed significant constraints on the scope of 'false information' beyond those established in the text of the law itself.[116] In relation to the pre-election judicial order in Article 1, the Conseil constitutional observed that the provision had been expressly framed to allow only the most problematic form of dissemination to be targeted: deliberate online mass dissemination using artificial or automatic means. It does not, for instance, cover offline broadcast or print services. A judge in making the order would also be required to ensure that the measures were the least restrictive of freedom of expression. The various textual and interpretative constraints were thus considered sufficient to prevent the restrictions operating in an excessive or arbitrary way.[117] A final check is provided by the possibility of appealing to a court of appeal in relation to a judicial order under Article 1. In relation to a suspension order by the CSA, there is scope to seek judicial review.

The pre-election transparency requirements, which do not repress information but rather require its publication, were also noted to be sufficiently clear, restricted to platforms exceeding a certain scale, and time-limited.[118] Any restrictions on the operators' freedom of expression and right to carry on a business were thus considered proportionate.

Turning to the temporal limits, the referring Senators and Deputies argued that the period of three months prior to the first day of the month of an election up until the close of the ballot was excessively long.[119] The Conseil constitutionnel, however, adopted an alternative perspective and considered the fact that a limit was imposed served to indicate that the restrictions were proportionate.[120] This is a rather unsatisfactory response, offering no clear indication as to when a restriction would be excessively long

How would the ECtHR evaluate the proportionality of the French provisions? The 'margin of appreciation' afforded states by the Court is limited where a measure restricts discussion of matters of public interest or impedes the press in its 'watchdog role'.[121] And because the French pre-election suspension provisions introduce subject or message-specific controls, applied on a case-by-case basis, they are not 'general measures' according to the criteria in the *Animal Defenders International* case.[122] The intensity of the French legislative scrutiny prior to adoption of the law will thus be of limited, if any, relevance in determining proportionality.

On the other hand, the Court affords states a 'wide margin' of appreciation in relation to the planning of domestic elections.[123] In *Bowman v UK* the Court explicitly held that 'it may be necessary, in the

[115] See, eg, CCD, n.5, para. 45.
[116] CCD, n.5, para.21.
[117] CCD, n.5, paras.18-26.
[118] CCD, n.5, para.9.
[119] CCD, n.5, para.45
[120] CCD, n.5, paras.8 and 50.
[121] App. no.34124/06, *Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland*, 21 June 2012, para.56.
[122] App. no.48876/08, *Animal Defenders International v UK*, 22 April 2013, paras. 107-108. This approach, could, however, apply to the pre-election transparency requirements in Art.1.
[123] App. no. 9267/81, *Mathieu-Mohin and Clerfayt v Belgium*, 2 March 1987, para. 54.

period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature"'.[124] But in *Bowman*, the measures were not content specific, aiming rather to control campaign expenses, and the French provisions appear closer to those at issue in *Salov*.[125] In *Salov* an individual had been prosecuted for distributing a newspaper recording, falsely, the death of a candidates in a presidential election. Given that such information, if correct, would be of considerable political relevance, the ECtHR held that the 'principles concerning the scope of political debate' were applicable. The 'relevance' and 'sufficiency' of the French measures, despite the election context, will still need to be convincingly established.[126]

One may indeed question whether it was really necessary to protect French citizens from exposure to manifestly false information in this way. The French appear to make relatively little use of fake news websites,[127] and, as Roseline Letteron has observed, Emmanuel Macron was elected despite being the target of potentially damaging false news stories.[128] Similarly, might not the transparency, media literacy, and self-regulatory initiatives in Law 2018-1202, be sufficient to fill any gaps left by the pre-existing election rules? Higher media literacy does appear to be linked to greater concern over misinformation and a greater awareness of credibility clues, but existing levels of media literacy are still low.[129] A recent survey for the Reuters Institute found that only 10% of those surveyed answered correctly all three of the very basic media-related questions that were asked, while 32% were unable to answer any of the questions correctly.[130] Additional information, for instance, in the form of dedicated fact-checking websites, will only be effective if actually accessed by social media users, notably those who read the fake news reports such services debunk. In a 2016 US survey, only about half of the Americans surveyed who visited a fake news website during the period studied also saw any fact-checks from one of the dedicated fact-checking websites.[131] These initiatives are not, therefore, quick fixes, their impact is still being assessed,[132] and they are unlikely to immunize the democratic system from social media disinformation at least in the short term.

In *Salov*, the operation of the Ukrainian penal measures were held to be disproportionate on the basis that they had been enforced against an individual who had merely passed on a forged copy of a newspaper.[133] He was not the author of the false information in the paper, of which he had only eight copies, and he had expressly stated that he was not himself sure of the truth of the report in the few discussions he had had with other people on the matter.[134] The French judicial order, which is not a penal measure, operates very differently. As we have seen, it requires online communication

[124] *Bowman*, n.95, para.43.
[125] *Salov*, n.84.
[126] Application no. 6538/74, *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, para.62.
[127] R. Fletcher, A. Cornia, L. Graves, and R. Kleis Nielsen, *Measuring the Reach of "Fake News" and Online Disinformation*, Reuters Institute/University of Oxford Factsheet, February 2018, recording that fake news websites were seen by 1% or fewer of the French online population each month in 2017, though circulation of specific posts were significantly amplified through distribution over Facebook, p.10, at: https://reutersinstitute.politics.ox.ac.uk/our-research/measuring-reach-fake-news-and-online-disinformation-europe.
[128] Letteron, n.2.
[129] N. Newman, R. Fletcher, A. Kalogeropoulos, D. Levy and R. Nielsen, *Reuters Institute Digital News Report 2018*, Reuters Institute for the Study of Journalism, pp.34-35, 48, at: http://www.digitalnewsreport.org/.
[130] Ibid.
[131] Guess *et al.,* n.105, p.10.
[132] Wardle and Derakhshan, n.23.
[133] *Salov*, n.84.
[134] *Salov*, n.84, paras 113-115.

providers to restrict the further mass dissemination of information found to be manifestly false and capable of influencing voters. There is scope for an appeal and publication elsewhere, subject to existing legal constraints. It is suggested that the ECtHR would find a judicial order restricting the further transmission of false information of this type to be proportionate, given, in particular, the Court's recognition of the importance of voters having access to true information.[135]

What of the three-month time limit? In *Bowman*, the expenditure limits applied four to six weeks prior to an election and the Court noted the importance for Ms. Bowman of being able to target voters during the 'critical period when their minds were focused on their choice of representative'.[136] A three-month period could be considered to extend well beyond this 'critical period' and thus be excessive. On the other hand, in *Bowman* the ECtHR also accepted the legitimacy of imposing restrictions in the periods both *preceding* and during an election[137] In *Animal Defenders International* it further confirmed that although 'the risk to pluralist public debates, elections and the democratic process would evidently be more acute during an electoral period, the Bowman judgment does not suggest that that risk is confined to such periods since the democratic process is a continuing one to be nurtured at all times by a free and pluralist public debate'.[138] Given, that disinformation can prove particularly 'sticky' to dislodge, particularly when it conforms to prior beliefs and is entrenched through repetition,[139] it is suggested that this aspect of the French Law would also be considered proportionate on freedom of expression, within the terms of Article 10ECHR.

iv) Prior Authorisation

Article 5 of the French Law enables the CSA to take into account a wide range of factors when determining whether to enter into an agreement to allow the broadcast of certain radio and television services in France.[140] The referring Deputies argued that this created a form of prior administrative approval, contrary to the guarantee of freedom of expression in Article 11 of the 1789 Declaration. The Conseil concluded that, given certain technical and economic constraints in the transmission of audiovisual services and the need to protect the constitutional values inherent in public order, the rights of others, and media pluralism, it was legitimate to subject specific categories of audiovisual services to a regime of prior administrative authorisation.[141] Refusal of a convention by the CSA would only be legitimate, however, if it could be established that the service in question posed a 'grave risk' to one of these values.

From an ECHR perspective, the third paragraph of Article 10(1)ECHR explicitly provides that states can continue to licence 'broadcasting, television and cinema enterprises'. The ECtHR has consequently accepted that radio and television services, even services from abroad, which fall within the protection of Article 10, can be licensed on both technical and content-based grounds, including 'the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights

[135] *Salov*, n.84, para.110. See section below for discussion of the CSA's powers to suspend, prior to an election, a foreign state controlled service.
[136] *Bowman*, n.95, para.45.
[137] *Bowman*, n.95, para.43.
[138] *Animal Defenders*, n.122, para.111.
[139] M.S. Chan, C.R. Jones, K.H. Jamieson, D. Albarracin, 'Debunking: A Meta-Analysis of the Psychological Efficacy of Messages Countering Misinformation', (2017) *Psychological Science* 28/11, pp.1531-1546; see also Wardle and Derakhshan, n.23, pp.41-48.
[140] CCD, n.5, para.30.
[141] CCD, n.5, para.32.

and needs of a specific audience and the obligations deriving from international legal instruments'.[142] Such measures must, however, be clearly defined, necessary and proportionate.

The provisions in the French Law relate not to licences to use French frequencies but rather authorisations relating to services that do not use such frequencies. In such a context, it is more difficult to argue that content controls to ensure, for instance, media pluralism, are necessary given the scope afforded France to provide for adequate levels of diversity from its own radio and television licensees. It may even be helpful to know how one's own state is being represented abroad, however misleading. Backed with foreign state money and influence, however, a radio or television service containing political disinformation could, in certain contexts, disrupt public order or the operation of domestic institutions.[143] Wider issues than media pluralism may thus be at stake, though in the absence of impending violence, there is limited scope to restrict political speech on national security grounds.[144]

It is, moreover, questionable whether a prior restraint based on what a service *might* do in the future, such as that envisaged in Article 5, is proportionate. Other less restrictive measures, such as a right of correction or temporary suspension of a programme strand, after a failure to comply with the terms of the authorisation, are possible.[145] Though accepting the legitimacy of licensing regimes, even in the print sector, the ECtHR has expressed particular concern where the publication of a complete periodical or service is prevented.[146] Article 5 could, from an ECHR perspective, therefore, prove to be one of the more problematic provisions in the French law. In its favour is the fact that a refusal to authorise the service can only be taken where there is a 'grave risk' that the company in question will damage one of the stated interests and that there is provision for judicial oversight.[147]

v) The Right to Equality and the Treatment of Foreign State Controlled Companies

The Deputies also argued that the power afforded the CSA to take into account content relayed on related company sites when granting, or resiling from, a convention with a foreign state controlled or influenced company, but not when considering other companies, infringed the principle of equal treatment.[148] The Conseil constitutionnel held that the differential treatment of foreign state owned or influenced companies could be justified by the particular gravity of an attempt by a foreign power to destabilise aspects of French democratic society, noted above.[149] The UN Special Rapporteur on Protection of Freedom of Expression has observed that 'governments are real offenders when it comes to disinformation',[150] so that these provisions do appear to target the 'main culprits', those most likely to pose a significant risk to important national interests. The Conseil also noted that the companies whose activities can be taken into account are those that are structurally related and can

[142] *Lentia,* n.96, para.32.
[143] Whether the transmission of, say, *Russia Today* could be considered to pose a 'grave threat' to the national interests of a state such as France is questionable.
[144] See, eg, application numbers 25067/94 and 2068/94, *Erdoğdu and İnce v Turkey*, 8 July 1999.
[145] Contrast the scope of the remedy here with the limited measures in the 1961 UN Convention on the International Right to Correction, 435 UNTS 191.
[146] Appl. No.26229/95, *Gaweda v Poland*, 14 March 2002, para.40. See also 2017 Joint Declaration, n.8, 1.f.
[147] See, further, section 5.2(v) below.
[148] CCD, n.5, para.31.
[149] CCD, n.5, para.41.
[150] W. Naeem, 'An Interview with UN Special Rapporteur David Kaye', *Digital Rights Monitor,* 26 December 2018, at: http://digitalrightsmonitor.pk/an-interview-with-un-special-rapporteur-david-kaye/. See also 2017 Joint Declaration, n.8, para.2.c.

thus be taken to share a common interest. Moreover, the decision to withdraw from a convention cannot be based solely on this content.[151]

6. Implications for the United Kingdom

The UK government is currently considering what steps to take to address various forms of online abuse and disinformation, building on the recent English Law Commission, Cairncross, and House of Commons, Digital Culture, Media and Sport ('DCMS') Committee, reports.[152] In the UK, as in France, there exist a number of criminal offences and civil actions, election-specific laws and self and co-regulatory regimes that can be employed to target the dissemination of false information, and, as in France, they provide patchy coverage.[153] French Law 2018-1202 presents a distinct approach to addressing some of these gaps, focusing on pre-election communications, foreign-state influenced broadcast services, and the transparency of paid-for communications and micro-targeting. A particular innovation is the creation of a fast-track judicial procedure to prevent further online dissemination of evidently false material that could affect the integrity of an election or referendum. The law does not address illegal or harmful content in general, focusing specifically on disinformation.

The French law is not the only approach being trialled in Europe and there has been considerable interest in the German Network Enforcement Act (the 'NetzDG').[154] The NetzDG requires providers of social networks with over two million registered users to remove or block content that contravenes specific provisions in the Criminal Code within a certain period of receiving a complaint. The offences covered do not relate specifically to pre-election false information but some of the offences could be relevant in this context, including those relating to defamatory and insulting speech, hate speech, certain depictions of violence, and 'untrue assertions of a factual nature' that could damage the government's relations with other states.[155] Social network sites have twenty-four hours to remove manifestly illegal content but this is extended to seven days if further investigation is required. They can also refer the matter to an independent self-regulatory body for a determination during this period.

Three features of the German law merit attention. Firstly, certain types of false information, caught by the French law, fall outside the scope of the NetzDG. For example, disinformation regarding the financial implications of a particular policy would be unlikely to involve defamation or damage inter-state relations, yet might influence voters. Secondly, once a complaint has been logged in the German system it is up to the social media network to investigate whether or not an offence has been committed, though there is scope to refer the matter to an independent self-regulatory body. Thirdly, primary responsibility rests with a private body to remove content, as opposed to a judge in the French context.

Consideration of models such as these help us to formulate relevant questions about our own regulatory reform of the online environment. Three such questions are considered briefly here.

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[151] CCD, n.5, para.70.

[152] See English Law Commission, *Abusive and Offensive Online Communications: A Scoping Report,* Law Com No.381/HC1682, 1 November 2018, and House of Commons (DCMS)(2018 and 2019), Cairncross (2019), and Electoral Commission (2018), all at n.13.

[153] For overview see English Law Commission, ibid, chap.11.

[154] Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken, 1 September 2017 (BGBl. I S. 3352), *Federal Law Gazette* I, p. 3352 ff. For English translation see: https://germanlawarchive.iuscomp.org/?p=1245.

[155] NetzDG, n.154, Article 1.3.

Firstly, to what extent should we rely on private companies to identify and remove harmful disinformation? The DCMS Committee have proposed the adoption of a code of conduct relating to harmful and illegal online content, to be implemented by technology companies and overseen by an independent regulator, with the power to impose fines. [156] Though co- and self-regulatory systems can encourage companies to 'internalise' socially desirable standards, they are not unproblematic in the context of political disinformation. Is it, for instance, appropriate for a private company to be making decisions on politically sensitive matters, even when overseen by, or with scope to refer questions to, an independent regulator? What if a major shareholder is associated with a particular political viewpoint or has investments that could be affected by a particular policy? Pressure from users, coupled with the risk of a fine if no action is taken, could lead to protective over-regulation, a concern raised in the German context.

Moreover, if the technology companies are required to investigate complaints raised by users then the financial burden could be significant. As noted, it is often difficult to establish that something is *not* the case, so when should the company stop investigating a complaint? To place the burden on industry in this way may be appropriate, but the German, and even more so French, models scale back potential liability considerably - limiting the range of problematic content in the former and placing the decision-making responsibility elsewhere in the latter.

From this perspective, the new French civil procedure, which entrusts oversight to an independent judge and requires complainants to establish both the falsity and potential democratic impact of the challenged statement, has certain attractions. The burden of proof rests with the complainant. Only the clearest cases of disinformation, contained by free speech guarantees, can trigger controls over further dissemination. If there is any doubt, publication will not be restrained. If we were to adopt a similar approach in the UK, consideration could be given to enlarging the role of the Election Court, an independent judicial body that can be petitioned by voters and candidates in relation to certain breaches of election law. Section 106 of the UK Representation of the People Act 1983 (the '1983 Act') covers some of the ground in the French legislation, making it a criminal offence to publish 'before or during an election' any false statement of fact relating to a candidate's personal character or conduct with the intention to affect the return of a candidate. The Election Court is guided, in interpreting legislation, by Article 10ECHR and has sought to draw a clear distinction between false statements of fact and other protected forms of political expression.[157] Alternatively, such an adjudicative function could be entrusted to a new independent regulator, subject to judicial review.

The French law also provides a speedy mechanism to prevent the transmission of disinformation even where the original author is not known. Here, too, the 1983 Act offers an interesting parallel. Section 106(3) authorises the High Court or County Court to grant an interim or permanent order prohibiting a person who has made or published false information from repeating it. *Prima facie* proof of the falsity is here sufficient, a lower standard than that applied in the context of the French emergency order, which requires 'manifest' proof. Both laws, however, indicate that it is possible to frame an independent procedure that operates quickly to prevent future dissemination of false information.[158]

Secondly, DCMS propose that the code should address both illegal content and certain 'harms'. One such 'harm' identified in the Report is harm to democracy,[159] so that the code could prohibit the dissemination of false information intentionally published to influence a future election or

[156] House of Commons (DCMS)(2019), n.13, Recommendations 37-8.
[157] *Watkins v Woolas* [2010] EWHC 2702 (QB) (05 November 2010), paras.36-47 and 74.
[158] House of Commons (DCMS)(2019), n.13, Recommendation 37.
[159] House of Commons (DCMS)(2019), n.13, para.15.

referendum. But to what extent in the online, as opposed to broadcast, context is it appropriate for the state to require private operators to control content that is not otherwise illegal - a significant extension to the German model? The passage of the French law underlines the importance of ensuring that, if this approach were to be adopted, any such harm is tightly defined to prevent illegitimate curtailment of political speech. The constraints imposed in the context of the French Law can thus provide a useful reference point in drafting such a provision.

On the one hand, French law is more expansive in scope than section 106 of the 1983 Act, in that it covers, in the context of L.97 of the Electoral Code, *any* false information intended to influence voters, which leads one or more to abstain from voting.[160] Both French and UK law require the falsity of the statement to be conclusively proved, under the 1983 Act employing the criminal standard of proof. But French Law 2018-1202 also requires 'manifest' evidence of the potential influence of the information on voters, whereas section 106 of 1983 Act focuses on whether the statement was intended to have this effect, subject to a defence that its maker or publisher reasonably believed, and did believe, the statement to be true. It is worth remembering here that those who publish fake news may have purely financial rather than political motivations. Arguably, the French requirement imposes an almost insuperable burden on complainants though it is also arguable that it correctly limits censorship to cases of real harm.

Thirdly, one of the potentially most important aspects of French Law 2018-1202 is its extensive transparency requirements. Both the Electoral Commission and the DCMS Committee in the UK have identified the need to enhance the transparency of paid-for content in the run-up to elections so that future implementation of the French Law could be of considerable practical interest.[161] It should be noted that the French Law goes well beyond requiring the transparency of paid-for content relevant to elections and addresses matters such as the use of personal data for micro-targeting and the revenues received from such activities. Not only is information to be made available to individual users but aggregated, up-to-date, data is to be published in a readily accessible format.

We can thus see that many of the questions currently being considered in the UK were examined by French politicians and judges during the adoption of Law 2018-1202. The French 'solution' has been criticised on a number of fronts - for curtailing political speech, for being designed simply to address Presidential concerns, and for being unlikely ever to be operative - but it does contain potentially far-reaching transparency provisions and seeks to walk a fine line between curbing legitimate speech and protecting the integrity of democratic elections. It is thus suggested that, in shaping a new regulatory framework for online communications in the UK, careful consideration be given to the various models now being developed worldwide and how they will interact in an increasingly international and inter-connected communications environment.

[160] See text at n.19.

[161] Electoral Commission (2018), n.13; House of Commons (DCMS)(2019), n.13, paras. 210, 212, 213, 215-217.